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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CS Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Comments of KMC Telecom Inc.

I. Introduction

KMC Telecom Inc. ("KMC") hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding (the "Notice"). KMC is a competitive local exchange carrier ("CLEC") dedicated to providing competitive local services in metropolitan areas throughout the United States. KMC provides facilities-based telecommunications services using state-of-the-art fiber optic networks in its service areas. KMC was formed in 1995 with the vision of bringing competition to markets that still remain predominately the exclusive domain of the incumbent local exchange carriers ("ILECs"). Today, a little over two and one half years after its founding, KMC has received authority to provide intrastate telecommunications services in 14 states, has completed construction of 8 networks, and has an additional 10 networks underway.

KMC filed Reply Comments on August 11, 1997 on the Commission's Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, FCC No. 97-94, and hereby incorporates those comments by reference into

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this proceeding.

Section 224 of the Act provides telecommunications carriers, such as KMC, the important right of non-discriminatory access to utility-owned and controlled poles, ducts and rights-of-way. This right is essential to the full scale and swift development of competition in local telecommunications services that still remains elusive in many areas of the United States. Strict adherence and prompt enforcement of the obligations of utilities under Section 224 of the Communications Act of 1934, as amended, (the "Act") will ensure that local competition does not remain a vision of a few but becomes a reality for many. The Commission's Notice represents the first step in the important process of developing regulations for just, reasonable and non-discriminatory pole attachment rates and access for telecommunications carriers.

KMC generally supports the proposals and tentative conclusions reached by the Commission in the Notice with the following modifications:

1. The Commission should reaffirm its finding in the Local Competition Order[1] that the term non-discriminatory as used in Section 224(e) and Section 224(f) of the Act requires uniform and equal application of the formulaic rate structure to all telecommunications providers and access on the same terms and conditions.

2. The Commission should establish a firm time frame of 90 days for resolving pole attachment complaints after the final pleadings are filed to remove the delay that often forces attaching telecommunications carriers to agree to excessive rates and unreasonable terms and conditions to obtain prompt access to poles, conduit and rights-of-way.

3. The Commission should require utilities to use actual pole inventories in determining pole attachment rates or permit rebuttable presumptions of average attachers based on different areas of pole density, i.e. urban, suburban and rural.

4. The Commission should preclude utilities from charging telecommunications carriers

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[1] First Report and Order, In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, 11 FCC Rcd 15,449, CC Docket No. 96-98, released August 8, 1996, 61 Fed. Reg. 45, 476 (1996) ("Local Competition Order") at para. 1556, rev'd in part, Iowa Utilities Board v. Federal Communications Commission, 1997 Westlaw 403401.

a separate attachment rate for overlashing fiber on their facilities or selling dark fiber within their systems.

5. The Commission should clarify how utilities should calculate the net linear cost of usable conduit space and not restrict the use of facilities installed in conduit by telecommunications carriers.

6. The Commission should reaffirm that utilities must provide telecommunications carriers non-discriminatory access to their rights-of-way and deny such access on a non-discriminatory basis only for reasons set forth in Section 224(f)(2) of the Act and must work with telecommunications providers to remove any municipal or local government conditions for use.

II. The Commission Should Reaffirm the Obligation of Utilities to Provide Telecommunications Providers with Non-Discriminatory Access and Rates

The Telecommunications Act of 1996 (the "1996 Act") amended Section 224 of the Act to require that utilities provide telecommunications carriers access to their poles, conduit and rights-of-way at just, reasonable and non-discriminatory rates and on a non-discriminatory basis. The amendment not discussed in detail in this Notice but discussed in detail in the Commission's Local Competition Order is the amendment that requires utilities to provide telecommunications carriers access to poles, conduit and rights-of-way on a non-discriminatory basis and at non-discriminatory rates. Section 224(e) of the Act provides, in relevant part:

> . . . . such regulations shall ensure that a utility charges just, reasonable **and nondiscriminatory** rates for pole attachments.[2]

Section 224(f)(1) provides:

> A utility shall provide a cable television system or any telecommunications carrier with **nondiscriminatory** access to any pole, duct, conduit or right-of-way owned or controlled by it. [3]

The Notice is silent on how the Commission intends to enforce the requirement of non-discrimination in complaint proceedings. As found by the Commission in the Local

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[2] 47 U.S.C. § 224(e)(1) (emphasis added).

[3] 47 U.S.C. § 224(f)(1) (emphasis added).

Competition Order, non-discrimination -- in its most basic form -- requires that utilities treat all telecommunications carriers and cable television systems equally in establishing the terms and conditions for access[4] and requires that the rates charged and terms and conditions imposed on telecommunications carriers under Section 224(e) of the Act be uniformly applied.[5]

The non-discriminatory access requirement of Section 224(f)(1) of the Act became effective upon enactment of the 1996 Act and is not tied to the effectiveness of the rate regulations developed by the Commission in this proceeding to implement Section 224(e) of the Act. Furthermore, access to poles, conduits and rights-of-way on a non-discriminatory basis is not subject to initial negotiation between a utility and telecommunications provider but is a firm statutory requirement. In reality, however, today utilities are striking separate deals with telecommunications providers that condition access on differing terms and conditions. This individualized brokering violates the non-discrimination requirement of Section 224(f)(1) of the Act. In this proceeding, the Commission must develop rules to consider pole attachment complaints that allege discriminatory rates and/or terms and conditions for pole attachments not just rates that fall beyond the statutory formula of just and reasonable.[6] In addition, the

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[4] See Local Competition Order at para. 1556. The Commission has found terms and conditions of pole attachment agreements, other than rates, to be unjust and unreasonable and violate Section 224. See Marcus Cable Associates, L.P. v. Texas Utilities Elec. Co., Declaratory Ruling and Order, DA 97-1527 (rel. July 21, 1997); Letter Ruling From Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., dated January 17, 1997 (DA 97-131) at 3-4.

[5] Local Competition Order at para. 1556 ("where access is mandated, the rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access").

[6] Section 224(e)(1) requires that the rates meet each of the three requirements of being: (1) just; (2) reasonable; and (3) non-discriminatory. In addition, until the regulations adopted in this proceeding become effective in 2001, telecommunications

Commission should caution utilities that, while individualized negotiation may be preferred, the negotiations must still result in rates, terms and conditions that are non-discriminatory and meet the statutory requirements of Section 224.

III. The Commission Should Resolve Pole Attachment Complaints Within 90 Days

In its Local Competition Order, the Commission established a deadline of 45 days for utilities to act on a telecommunications carrier's application for pole attachments.[7] Complaints for denial of access must be filed at the FCC within 60 days of a denial.[8] The Commission also committed to expeditiously rule on complaints. What is missing from the Local Competition Order and has stymied the strict compliance by utilities with Section 224 is a firm deadline for Commission action on a complaint once the pleadings are filed. Such a deadline for action is critical if the complaint process is to be effective in addressing the imposition of unjust, unreasonable and discriminatory rates. In KMC's experience, utilities have used the delay attendant to the processing of an FCC complaint to their advantage by refusing to sign agreements for pole access unless KMC waives its rights to pursue an FCC remedy and agrees to access on terms that do not meet the statutory requirements of Section 224 of the Act.[9] Faced with a need for quick access and an opened ended complaint procedure at the FCC, CLECs often

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providers are entitled to rates determined to be just and reasonable under Section 224(d).

[7] Local Competition Order at para. 1224.

[8] Id. at para. 1225.

[9] As discussed in KMC's Reply Comments in CS Docket No. 97-98, the Commission should affirm the finding of the Cable Services Bureau and declare unreasonable and unenforceable under Section 224 terms and conditions that require a telecommunications carrier or cable television provider to waive its legal rights to review or challenge a pole attachment and conduit access agreement before the FCC or in court.

must accept an agreement that does not protect their full rights under Section 224 of the Act. A specific time frame of 90 days for FCC action on a pole attachment complaint after the pleadings are filed would remove the time advantage leveraged by utilities seeking to negotiate agreements outside the boundaries of Section 224.

IV. Actual Pole Inventories Should Be Used in Calculating Pole Attachment Rates

In the Notice, the Commission properly focuses on two key issues in developing the rate formula for allocation of unusable space pursuant to Section 224(e)(1). (1) What is an attacher? (2) How many attachers are there? KMC endorses the Commission's tentative conclusion to include as attachers, utilities that provide telecommunications services, the incumbent LECs, government agencies and all other attachers. The formula set forth in Section 224(e)(1) specifies that a calculation of the unusable space rate includes a calculation of an equal apportionment of space among "**all attaching entities**".[10] The statute does not limit the attachers to telecommunications carriers as defined for purposes of Section 224 nor does it exclude any other classification of carrier or entity. Accordingly, the FCC properly should conclude that the formula requires the inclusion of all attachers regardless of their classification.

KMC also supports the presumption of occupancy of one foot of space by each attacher and a separate counting of attachers for each foot of space used. In many instances, entities that have been attached to the poles for a long time, often the ILECS, have leased more than one foot of space. In these cases, as an occupant of more than one foot, an ILEC is properly allocated the unusable space of two or more attachers (corresponding to the number of feet or portion thereof used) for purposes of applying the formula. To do otherwise would be to require telecommunications providers, excluding the ILECs that are not subject to Section 224, to

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10 47 U.S.C. § 224(e)(2) (emphasis added).

contribute more towards the unusable space then would be contributed under a truly equal apportionment.

The Commission seeks comment on whether utilities should be permitted to establish a presumptive average of the number of attachers on its poles rather than take an actual pole inventory which the Commission suggests is too costly. KMC believes a per pole inventory is realistic and reasonable. Prior to installing any attachments it is common for the utility and telecommunications carrier to collectively inventory the poles to which the carrier seeks access. This inventory or field survey is performed to determine the make ready and other required work, and the availability of space on the pole prior to the attachment. Accordingly, a pole-by-pole inventory is routinely conducted. This inventory provides the data necessary to identify the specific number of attachers on each pole that can then be applied to a rate formula to establish the pole attachment rate. A per pole inventory also is critical to permit the downward adjustment of rates and reallocation of costs based on attachments by additional entities.

If the Commission concludes that a per pole inventory is not feasible, KMC encourages the Commission to require utilities to establish separate presumptions for different demographic areas. As suggested by the Commission in the Notice, the appropriate presumptions for the number of attachers vary in urban, suburban and rural environments. This area-by-area presumption is particularly appropriate given the precise allocation formula set forth in Section 224(e)(1) of the Act. In addition, any presumption must be only a presumption that is rebuttable by data in any complaint proceeding.

V. The Commission Should Not Permit Separate Attachment Fees for Dark Fiber of Overlashing

The pole attachment rate formula in Section 224(e)(1) is designed to permit a utility to recover its costs in providing physical access to its poles, conduit and rights-of-way. Additional

use of the facilities that do not require additional physical pole space and therefore are not appropriately subject to an additional attachment fee. Certainly, no additional space is required for the lease of dark fiber by a telecommunications carrier to a third party when the dark fiber is within an existing authorized attachment. Similarly, no additional physical pole space is required for overlashing. In addition to the absence of an increased physical burden, the lease of dark fiber would be difficult to police and poses significant concerns of unreasonableness as recognized by the Commission recently in Marcus Cable Associates, L.P. v. Texas Utilities Elec. Co., Declaratory Ruling and Order, DA 97-1527 (rel. July 21, 1997).

VI. The Commission Should Establish a Methodology for Determining Net Linear Cost of Unusable Conduit Space and Not Restrict its Use

KMC endorses the Commission's proposal to presumptively use a one-half duct methodology for occupancy of conduit. Critical to the formula also is a determination of net linear cost of usable conduit space. While the Commission has consistently indicated the methodology for calculating pole costs, the Notice does not contain any indication of what components are properly considered a part of net linear cost for conduit. KMC urges the Commission to establish regulations indicating the appropriate costs included in net linear cost and requiring utilities to provide this data to telecommunications carriers seeking conduit access. In addition, consistent with the right of telecommunications carriers to access utility-owned and controlled conduit, the utilities should not be permitted to restrict the use of facilities installed by telecommunications carriers to specific services. Leases, such as dark fiber leases, do not involve separate physical access or occupancy and do not warrant any additional restriction or additional attachment fee.[11]

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[11] Under Section 224, as amended, once the Commission's proposed regulations in this proceeding become effective only cable television systems that provide exclusively cable services will remain subject to the rate methodology set forth in Section 224(d). If

VII. Non-Discriminatory Access to Rights-of-Way is Required Under Section 224

While poles and conduit may be the most often utility facilities for which attachments are sought, rights-of-way continue to be an important physical location for installation of competitive local networks. The installation of poles for new networks is now routinely discouraged by municipal governments that are encouraging utilities to relocate their facilities underground. For underground installation, often the only two options for CLECs are attachments in existing conduit space owned or controlled by utilities or installation in the rights-of-way.[12] If conduit capacity is unavailable or the price is cost-prohibitive installation in the rights-of-way may be a competitive carrier's only choice. For this reason, the right of access to utility owned and controlled rights-of-way granted to telecommunications carriers in Section 224 is essential although it may be less frequently used. In addition, rights-of-way may provide the only means of access to serve customers in a multi-tenant environment.

Under Section 224 access to rights-of-way owned or controlled by utilities can only be denied for reasons of insufficient capacity, safety, reliability or generally applicable engineering purposes.[13] Denial of access for any other reason would violate Section 224. Accordingly, utilities should be required to work with telecommunications carriers to resolve any other

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a cable television system offers any services in addition to cable services, it will be subject to the same rate methodology applied to telecommunications carriers under Section 224(e)(1). To this extent, Congress has eliminated the categorical distinction recognized by the Court in Texas Utils. Elec. Co. v. FCC, 977 F.2d 925 (D.C. Cir. 1993) between cable television systems that offer telecommunications services and non-cable television telecommunications systems.

[12] KMC does not currently have a proposed methodology for calculating pole attachment rates for rights-of-way but reserves the right to comment on methodologies proposed by the utilities in its reply comments in this proceeding.

[13] 47 U.S.C. § 224(f)(2).

impediments to access to their rights-of-way including unreasonable conditions imposed by local, municipal or state governments. Although local barriers to entry are now prohibited under Section 253 of the Act, municipalities often seek to restrict access to rights-of-way even those occupied and owned and controlled by utilities with unreasonable conditions and excessive fees. Such obstacles fly not only in the face of Section 253 but also violate Section 224 of the Act. Therefore, as a condition of their obligations under Section 224, utilities should be required to work with telecommunications carriers to cooperatively resolve any municipal issues involving a telecommunications carrier's use of utility owned or controlled rights-of-way. The right of non-discriminatory access to rights-of-way is important to the future of local competition and an important right provided to telecommunications carriers under Section 224 of the Act that should not be frustrated by unreasonable restrictions.

Respectfully submitted,

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